No. 83-1967

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN MURRAY,

Petitioner

v.

BRANCH MOTOR EXPRESS COMPANY

and

LOCAL 557, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENT BRANCH MOTOR EXPRESS COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below, in accordance with the general rule that a court should apply the law as it exists at the time of its decision, correctly based its holding on this Court's decision in *DelCostello v. International Brotherhood of Teamsters*, 103 S. Ct. 2281 (1983)?

2. Whether the court below, in determining whether to apply *DelCostello* retroactively to Petitioner's claims, should have considered the state of the law at the time Petitioner's alleged claims arose, or at the time of *DelCostello*, where the selection of either time frame would have resulted in the same decision?

3. Whether the court below, in determining whether to apply *DelCostello* retroactively to Petitioner's claims, should have accorded the factors in the test of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), different weights, where according the factors different weights would have resulted in the same decision?

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BRIEF OF RESPONDENT BRANCH MOTOR EXPRESS COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Branch Motor Express Company respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Fourth Circuit Court of Appeals' decision in this case.

COUNTERSTATEMENT OF JURISDICTION

Petitioner seeks review of the decision below by writ of certiorari pursuant to 28 U.S.C. §1254(a)(1976). This Court extended Petitioner's time for filing the instant petition until May 18, 1984 pursuant to 28 U.S.C. §2101(c)(1976).

STATUTORY PROVISIONS INVOLVED

This case does not involve the application or interpretation of any constitutional provision, treaty, statute, ordinance, or regulation.

COUNTERSTATEMENT OF THE CASE

This case involves claims for damages and reinstatement brought by Petitioner against Respondents Branch Motor Express Company (hereinafter "Branch") and Local 557, International Brotherhood of Teamsters (hereinafter "Local 557") pursuant to section 301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a)(1976). (A.6)[1] The Complaint alleges that Branch discharged Petitioner in violation of the collective bargaining agreement and that Local 557 breached its duty of fair representation in connection with the processing of Petitioner's grievance concerning his discharge. The discharge occurred on January 26, 1976, and Arbitrator Leon Sachs denied Petitioner's grievance of that discharge on April 22, 1976.

The Complaint was filed on September 13, 1978 in the United States District Court for the District of Maryland. Both Respondents pleaded, *inter alia*, the affirmative defense of the statute of limitations in their Answers to the Complaint. (A.28, A.30).[2] In an Opinion and Order dated July 31, 1979, that court granted Respondents' Motions for Summary Judgment for the reason that Petitioner failed to exhaust intra-union remedies prior to instituting his action. (A. 259). By an Order and *per curiam* Opinion dated May 6, 1980, the Fourth Circuit Court of Appeals affirmed the lower court's entry of judgment in favor of Branch and Local 557. (Supp. A.13).

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1. Citations in the form (A.6) refer to the Appendix filed in C. A. No. 79-1485 in the court below. Citations in the form (Supp. A.6) refer to the Supplemental Appendix filed in C. A. No. 82-1202 in the court below.

2. Despite Petitioner's contention to the contrary (Petition for Writ of Certiorari at 10), both Respondents, as illustrated by their Answers to Petitioner's Complaint, did in fact raise the statute of limitations issue in the courts below.

This Court subsequently vacated and remanded the Fourth Circuit Court of Appeals' Order for reconsideration in light of *Clayton v. United Automobile Workers*, 451 U.S. 679 (1981) (Supp. A.1); the circuit court, in turn, remanded the case to the district court for similar reconsideration. (Supp. A.2). Branch and Local 557 thereafter renewed their Motions for Summary Judgment and filed additional Supporting Memoranda, arguing, *inter alia*, that Petitioner's action was barred by the applicable statute of limitations. This argument was based on this Court's decision in *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981), and on the Fourth Circuit Court of Appeals' decision in *Sine v. Local No. 992*, 644 F.2d 997 (4th Cir.), *cert. denied sub nom. Sine v. Mitchell Transport, Inc.*, 454 U.S. 965 (1981), both of which were decided in the interim between Respondents' first and second sets of summary judgment motions.

Following oral argument, the district court again granted summary judgment in favor of Respondents, and proferred three alternative grounds for its holding. (Supp. A.3). First, the court held that Local 557's conduct did not amount to a breach of its duty of fair representation. Second, it held that under the standards of *Clayton v. United Automobile Workers*, 451 U.S. 679 (1981),[3] Petitioner's failure to exhaust his intra union remedies barred his action. Third, the court held that Petitioner's claims against both Branch and Local 557 were barred by the applicable statute of limitations, relying on *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981).

On appeal, the Fourth Circuit Court of Appeals addressed only the statute of limitations issue, and considered the effect on that issue of this Court's intervening

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3. In his Petition for Writ of Certiorari, Petitioner contends that the district court on remand "ignored" this Court's *Clayton* decision. (Petition at 10). A review of the district court's opinion on remand, however, reveals that the court applied the appropriate principles as articulated in *Clayton*. (Supp. A.3).

decision in *DelCostello v. International Brotherhood of Teamsters*, 103 S. Ct. 2281 (1983). *Murray v. Branch Motor Express Company*, 723 F.2d 1146 (4th Cir. 1983). Finding that the *DelCostello* decision should be applied retroactively, the court of appeals affirmed the district court's decision, and held that the six month limitations period applied by this Court in *DelCostello* to section 301 actions brought against a union and an employer barred Petitioner's action.[4] In so holding, the court of appeals relied on the Third Circuit Court of Appeals' decision in *Perez v. Dana Corporation, Parish Frame Division*, 718 F.2d 581 (3d Cir. 1983).

Petitioner now seeks review in this Court of the Fourth Circuit Court of Appeals' decision affirming the dismissal of Petitioner's action on statute of limitations grounds.

SUMMARY OF REASONS FOR DENYING THE WRIT

No special or important reasons exist within the meaning of Supreme Court Rule 17.1 to justify the grant of a writ of certiorari in the instant case. The issue of whether this Court's decision in *DelCostello v. International Brotherhood of Teamsters* should be applied retroactively to bar a hybrid section 301 action filed more than six months after the claims arose is of little significance given the diminishing number of cases to which it is relevant, this Court's own retroactive application of the six-month limitations period in *DelCostello* itself, and this Court's denial of certiorari in the four other cases which have raised the issue. Indeed, the issue is merely

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4. Contrary to Petitioner's assertion, the court of appeals did not "ignore" Petitioner's argument that *DelCostello* should be applied prospectively only. (Petition at 11). Rather, the court expressly considered the issue, and rejected Petitioner's contention on its merits. 723 F.2d at 1147-48.

of academic import in the instant case, as Petitioner's action would be barred by the applicable limitations period even if *DelCostello* were not applied. Further, no real and embarrassing conflict in principle or law exists among the circuit courts of appeals on this issue; the decisions of the single circuit court which has applied *DelCostello* prospectively only are factually distinguishable from decisions of the other circuit courts applying *DelCostello* retroactively as well as prospectively.

Certiorari should also be denied as to the issues raised by Petitioner concerning the test set forth in this Court's decision in *Chevron Oil Co. v. Huson* for the non-retroactivity of judicial decisions. These issues are not properly before this Court, as the issues were neither raised nor decided in the court below. Further, even if the issues concerning *Chevron* were properly before this Court, no special or important reasons exist for granting a writ of certiorari, as resolution of those issues would not alter the decision below on the retroactivity of *DelCostello*. Respondent respectfully requests, therefore, that this Court deny the instant Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

Although Petitioner raises three questions for review in his petition, there are essentially only two issues before this Court: first, whether the court below, in accordance with the general rule that a court should apply the law as it exists at the time of its decision, correctly based its holding on this Court's decision in *DelCostello v. International Brotherhood of Teamsters*; and second, whether it is necessary to re-examine this Court's decision in *Chevron Oil Co. v. Huson* in the context of the issue of *DelCostello's* retroactivity. For the reasons stated below, Branch respectfully submits that this Court should deny the instant petition as to both issues.

I. The Issue Of Whether The Court Below, In Applying The Law As It Existed At The Time Of Its Decision, Correctly Based Its Holding On This Court's Decision In DelCostello v. International Brotherhood Of Teamsters, 103 S. Ct. 2281 (1983).

A. Certiorari Should Be Denied For The Reason That No Special Or Important Reasons Justify The Supreme Court's Review Of This Issue.

Rule 17.1 of the Supreme Court Rules of Procedure provides that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." As stated by Chief Justice Taft in *Magnum Import Company, Inc. v. Coty*, 262 U.S. 159, 163 (1923), certiorari jurisdiction "was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." Rather, a petition for writ of certiorari must raise a question of public importance, and not a question limited to the interests of the immediate litigants. *See, e.g., Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955) (noting that the Supreme Court does not "sit for the benefit of particular litigants").

This Court is especially hesitant to grant a writ of certiorari in cases where the issue raised by the petition for writ of certiorari is narrowly confined and not apt to have continuing future consequences. In *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955), for example, this Court dismissed as improvidently granted a writ of certiorari on the issue of whether a state court's enforcement of a discriminatory restrictive covenant constituted state action for purposes of the Fourteenth Amendment. The Court noted that a recently enacted state statute rendered null and void discriminatory restrictive covenants of the type involved in the case, thus negating any future impact of the lower court's decision on the state action issue. Finding that the petition for writ of certiorari did not raise a "special

and important" issue within the meaning of the forerunner of current Supreme Court Rule 17.1, this Court stated:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit for the benefit of the particular litigants . . . "Special and important reasons" imply a reach to a problem beyond the academic or the episodic.

349 U.S. at 74.

In the instant case, the issue raised by the Petitioner concerning the retroactivity of *DelCostello* to "hybrid" section 301 actions[4] fails to implicate concerns of a "special and important" nature for several reasons. First, the problem of retroactive application of a new statute of limitations decision such as *DelCostello* is necessarily a temporary problem; as time passes, there will be fewer and eventually no actions which will have commenced prior to the date of the new decision which announced the applicable limitations period.[5] The issue of *DelCostello's* retroactivity, therefore, as with the issue in *Rice v. Sioux City Memorial Park Cemetery, Inc.*, may "present an intellectually interesting and solid problem," but its nature is such that the problem is merely episodic. *Rice*, 349 U.S. at 74. The question, then, is whether the issue is nonetheless of such importance that this Court should issue a writ of certiorari to address the retroactivity issue as it applies to the quickly diminishing number of cases to which it is relevant.

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4. As recognized by this Court in *DelCostello*, a "hybrid" section 301 action is one where an employee sues his employer for breach of the collective bargaining agreement and his union for breach of its duty of fair representation. 103 S. Ct. at 2291.

5. Because this Court rendered its *DelCostello* decision on June 8, 1983, the retroactivity issue concerns only those "hybrid" section 301 actions commenced prior to that date.

Respondent respectfully submits that this Court's own action in retroactively applying the six-month limitations period to the employees' actions in *DelCostello* mandates the conclusion that the retroactivity issue is not "special and important." Two cases were consolidated for review in *DelCostello*; in those cases, Nos. 81-2408 and 81-2386, the hybrid section 301 actions were filed more than ten months and more than seven months, respectively, after the employees' claims had accrued. After determining that the six-month limitations period of 29 U.S.C. §160(b)(1976) was the appropriate limitations period for both prongs of a hybrid section 301 action, this Court applied its decision retroactively to bar the employees' claims in Case No. 81-2408, and remanded Case No. 81-2386 for a determination as to whether the six-month limitations period barred the employee's claims, or was tolled because of certain allegations raised by the employee. 103 S. Ct. at 2294-95.

Implicit in this Court's retroactive application of the six-month limitations period in *DelCostello* to Case No. 81-2408 is the conclusion that *DelCostello* is to be applied retroactively to all cases. This interpretation of the Court's action in *DelCostello* is supported by the long standing rule that judicial precedents normally have retroactive as well as prospective effect. *See, e.g., Linkletter v. Walker*, 381 U.S. 618, 622 & n. 6 (1965) ("At common law there was no authority for the proposition that judicial decisions made law only for the future."); *Kahn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) ("Judicial decisions have had retrospective operation for near a thousand years."). This interpretation is also supported by the fact that although the *DelCostello* Court expressly found that application of the six-month limitations period to hybrid section 301 actions rendered unnecessary a decision on the retroactivity of its decision in *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981), it did not even mention the

retroactivity issue in the context of *DelCostello*.[6] 103 S. Ct. at 2287 n. 11. Thus, despite the *DelCostello* Court's presumed awareness of a potential issue concerning *DelCostello's* retroactivity, it chose to give *DelCostello* retrospective effect to the cases before it. The decision of the Fourth Circuit Court of Appeals below, therefore, is consistent with the implicit instruction of this Court itself that *DelCostello* is to be applied retroactively.

The absence of any "special or important" reasons justifying certiorari review in the instant matter is further highlighted by the fact that this Court previously denied this term four petitions seeking review of the issue of *DelCostello's* retroactivity. *Erkins v. United Steelworkers of America,* No 83-1866 (U.S. June 10, 1984); *Teamsters Local Union No. 36, Building Material and Dump Truck Drivers v. Edwards,* 104 S. Ct. 1599 (Case No. 83-1211, March 19, 1984); *Brain v. Roadway Express, Inc.*, 104 S. Ct. 1285 (Case No. 83-1034, February 21, 1984); *Ernst v. Indiana Bell Telephone Co., Inc.*, 104 S. Ct. 707 (Case No. 83-687, January 9, 1984). Indeed, this Court's refusal to review the decision of the single circuit court that has denied retroactive application to *DelCostello* strongly suggests that the issue of *DelCostello*'s retroactivity is not of such a "special or im-

6. The *DelCostello* Court's silence on the retroactivity issue is instructive, for the Supreme Court "is well aware of how to avoid the effects of applying one of its rulings retroactively." *Cates v. Trans World Airlines, Inc.*, 561 F.2d 1064, 1073 (2d Cir. 1977). For example, in *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964), this Court specifically held that the rule of law announced therein would not be applied retroactively to either the case before the Court or to any other pending cases. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), this Court applied the rule first set forth in that case to affirm the lower court's dismissal of the case before it, but expressly held that the rule was not to be applied to other pending cases. More recently, in a case decided only one month after *DelCostello*, a majority of this Court held that its decision in *Arizona Governing Committee For Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 103 S. Ct. 3492 (1983), would be given prospective effect only.

portant" quality as to justify review by writ of certiorari.[7] *Edwards*, 719 F.2d 1036 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1599 (1984).

Moreover, the issue of *DelCostello*'s retroactivity is of little significance even to Petitioner in light of the fact that his action is untimely whether or not *DelCostello* is applied retroactively. Petitioner filed this action nearly two and a half years after the arbitrator upheld his discharge. Prior to this Court's decision in *DelCostello*, the Fourth Circuit Court of Appeals followed this Court's decision in *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981), and applied the state limitations period for an action seeking vacation of an arbitration award to both the breach of contract claim and the breach of the duty of fair representation claim in a hybrid section 301 action. *See, e.g., DelCostello v. International Brotherhood of Teamsters*, 524 F. Supp. 721 (D. Md. 1981), *aff'd mem.*, 679 F.2d 879 (4th Cir. 1982), *rev'd and remanded*, 103 S. Ct. 2281 (1983). Fourth Circuit law also recognized that this Court's decision in *Mitchell* was to be applied retroactively. *Id.*[8]

If this Court's decision in *DelCostello* is not applied retroactively to bar Petitioner's claim, therefore, the law of the Fourth Circuit mandates that the appropriate statute of limitations for Petitioner's claims is the forum state's limitations period for an action to vacate an arbi-

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7. Rather than call this Court's attention to the denial of certiorari in *Edwards, Brain*, and *Ernst*, Petitioner argues that this Court's grant of certiorari in *Solem v. Stumes*, 103 S. Ct. 3568 (1984) supports his Petition. The latter petition, however, arose in the context of a criminal case, and involves the issue of the retroactive application of a decision that enlarged the scope of an accused's constitutional rights upon arrest. Respondent respectfully submits that this Court's grant of certiorari in *Solem* has little relevance to the instant petition, especially when viewed in light of the denials of certiorari in *Erkins, Edwards, Brain*, and *Ernst*.

8. Branch notes that this position on the retroactivity of *Mitchell* is supported by at least two members of this Court. *DelCostello*, 103 S. Ct. 2281, 2296 & n.2 (O'Connor, J., dissenting).

tration award. Because Petitioner's alleged claims arose in Maryland, the appropriate limitations period is 30 days. Md. Cts. & Jud. Proc. Code Ann. §3-224. Petitioner's suit, therefore, which was filed nearly two and a half years after his claims arose, is barred whether this Court's *DelCostello* opinion is retroactively applied, or whether the Fourth Circuit's pre-*DelCostello* law is applied. Thus, the instant petition fails to raise "a problem beyond the academic or the episodic," and no "special or important" reasons within the meaning of Supreme Court Rule 17.1 exist to justify the exercise of this Court's certiorari jurisdiction.

B. Certiorari Should Be Denied For the Reason That The Decision Of The Fourth Circuit Court of Appeals Below Is Not In Conflict With Decisions Of The Other Circuit Courts Of Appeals.

Rule 17.1(a) of the Supreme Court Rules states that this Court will consider issuing a writ of certiorari "[w]hen a federal court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter." Although this rule does not define the term "conflict," it is clear from past decisions of this Court that the conflict must be substantial, and directed to the application of a principle of law. A conflict resulting from different fact patterns will not warrant review by writ of certiorari. *See, e.g., Wisconsin Electric Co. v. Dumore Co.*, 282 U.S. 813 (1931) ("It appearing that the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law, the writ of certiorari is dismissed as improvidently granted."); *Layne & Bowler Corporation v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) ("[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and

in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.").

In support of his Petition, Murray argues that there is a "substantial conflict" between the circuit courts of appeals on the retroactivity of this Court's decision in *DelCostello v. International Brotherhood of Teamsters*, 103 S. Ct. 2281 (1983). (Petition at 12). Respondent submits, however, that no conflict in principle exists among the courts of appeals on this issue. Instead, the difference in result between the decision in the court below applying *DelCostello* retroactively, and the decision of the one circuit court of appeals that has applied *DelCostello* prospectively only, is explained by differences in each circuit's law prior to *DelCostello* concerning the appropriate limitations period for hybrid section 301 actions.

At the present time, nine of the twelve circuit courts of appeals have considered the retroactivity of this Court's decision in *DelCostello*; eight, including the court below, have decided to apply *DelCostello* retroactively.[9] The Ninth Circuit Court of Appeals has decided to apply *DelCostello* prospectively only.[10] In considering

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9. *Welyzko v. U.S. Air, Inc.*, No. 83-7976, slip op. (2d Cir. April 25, 1984) (appended as Exhibit 1); *Lincoln v. District 9 of the International Association of Machinists and Aerospace Workers*, 723 F.2d 627 (8th Cir. 1983); *Murray v. Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir. 1983); *Rogers v. Lockheed-Georgia Co.*, 720 F.2d 1247 (11th Cir. 1983); *Edwards v. Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir. 1983); *Perez v. Dana Corp., Parish Frame Division*, 718 F.2d 581 (3d Cir. 1983); *Ernst v. Indiana Bell Telephone Co.*, 717 F.2d 1036 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 707 (1984); *Curtis v. International Brotherhood of Teamsters*, 716 F.2d 360 (6th Cir. 1983).

10. *Barina v. Gulf Trading and Transportation Co.*, 726 F.2d 560 (9th Cir. 1984); *Edwards v. Teamsters Local Union No. 36, Building Material and Dump Truck Drivers*, 719 F.2d 1036 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1599 (1984).

the retroactivity issue, each of the appellate decisions which expressly addressed this issue began with this Court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

Although the general rule is that judicial decisions have retrospective as well as prospective effect, *see, e.g., Linkletter v. Walker*, 381 U.S. 618, 622 & n. 6 (1965), this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), set forth a three-part test to determine whether, in exceptional circumstances, a judicial decision should be given prospective effect only. Under the *Chevron* test, retroactive application is inappropriate only where: first, the decision in question establishes "a new principle of law, either by overruling clear past precedent on which the litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed;" second, retroactive application will retard operation of the new decision's purpose; and third, inequity will result from retroactive application. *Chevron*, 404 U.S. at 106-07.

The first factor, the state of the law prior to the new decision, requires a court considering the retroactivity of a new decision to survey the binding court precedent on the relevant issue that existed prior to the new decision.

In his Petition, Murray also cites the Sixth Circuit Court of Appeals' pre-*DelCostello* decision in *Pitts v. Frito-Lay, Inc.*, 700 F.2d 330 (6th Cir. 1983) as holding that *DelCostello* should be applied prospectively only. The *Pitts* case in fact held, however, that the Sixth Circuit's own pre-*DelCostello* case, *Badon v. General Motors Corp.*, 679 F.2d 93 (6th Cir. 1982), which held that the appropriate limitations period for hybrid section 301 actions is the six-month limitations period of 29 U.S.C. §160(b)(1976), should not be applied retroactively because it signified a clear break from previous Sixth Circuit law. Despite the *Pitts* decision, the Sixth Circuit Court of Appeals has twice since applied *DelCostello* retroactively, although with no specific discussion of the issue. *Brain v. Roadway Express, Inc.*, No. 82-3078, slip op. (6th Cir. September 23, 1983), *cert. denied*, 104 S. Ct. 1285 (1984); *Curtis v. International Brotherhood of Teamsters*, 716 F.2d 360 (6th Cir. 1983).

If no definitive Supreme Court precedent exists on the issue, this inquiry necessarily will be circuit-specific; that is, it is possible that absent a Supreme Court decision on the issue, the state of the law in each circuit prior to the new decision may be different. *See, e.g., Perez v. Dana Corporation, Parish Frame Division*, 718 F.2d 581, 586 n. 7 (3d Cir. 1983) (recognizing that prior to *DelCostello* and because this Court declined to address the issue in *Mitchell*, the circuits "could not agree on whether the same statute of limitations governed both the [§301] action against the employer and the [§301] action against the union").

Similarly, the third factor, equity, is inherently fact-specific. Whether retroactive application of a new decision will cause an inequitable result is necessarily dependent on the facts of each case. Conversely, the second factor, the new decision's purpose, should be constant in any consideration of a new decision's retroactivity.

Applying these principles to the issue of *DelCostello*'s retroactivity reveals the true source of the alleged "conflict" between the Ninth Circuit Court of Appeals' decisions applying *DelCostello* prospectively only, and the decisions of the court below and the other circuit courts of appeals that have applied *DelCostello* retrospectively, as well as prospectively. Because each circuit had developed its own law on the issue prior to *DelCostello*, and because of the different equities of each case, the Ninth Circuit Court of Appeals and the court below arrived at different conclusions. The alleged "conflict," therefore, is not a conflict of principle or law, but is a conflict of fact, and as such does not justify review by this Court. *Wisconsin Electric Co. v. Dumore Co.*, 282 U.S. 813 (1931); *see also, United States v. Johnston*, 268 U.S. 220, 227 (1925) (stating that this Court does not "grant certiorari to review evidence and discuss specific facts").

In *Edwards v. Teamsters Local Union No. 36, Building Materials and Dump Truck Drivers*, 719 F.2d 1036 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1599 (1984), for example, the Ninth Circuit Court of Appeals concluded that *DelCostello* effectively overruled its decision in *Price v. Southern Pacific Transportation Co.*, 586 F.2d 750 (9th Cir. 1978). *Price* had applied a three-year limitations period to the duty of fair representation prong of a hybrid section 301 action. Seemingly combining the second and third *Chevron* criteria, the court then found that because the plaintiff in *Edwards* may have relied on the *Price* decision in filing his suit almost ten months after his claim arose, and because he could not have anticipated the new limitations period, it would be inequitable to bar the plaintiff's claim. 719 F.2d at 1040-41.[11]

In the instant case, the issue of *DelCostello*'s retroactivity was also examined in light of the *Chevron* criteria. The court below, however, in accordance with the Third Circuit Court of Appeals' decision in *Perez v. Dana Corporation, Parish Frame Division*, 718 F.2d 581 (3d Cir. 1983), found that the *DelCostello* decision did not constitute a clear overruling of prior precedent because the prior law was erratic and inconsistent. 723 F.2d 1146, 1148. The court in *Perez* noted that when the plaintiff's cause of action arose, no clear past precedent

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11. Soon thereafter, the Ninth Circuit Court of Appeals again considered the retroactivity of *DelCostello*, this time as it applied to an employee's section 301 action against his employer. *Barina v. Gulf Trading and Transportation Co.*, 726 F.2d 560 (9th Cir. 1984). Relying on *Edwards*, the court found that *DelCostello* should be applied prospectively only to this type of action. The court did find, however, applying the second *Chevron* factor, that the policies and purposes behind *DelCostello* favored retrospective as well as prospective application of the decision. 726 F.2d at 564. This latter finding is in accord with all other circuit courts that have considered this issue. *See, e.g., Rogers v. Lockheed-Georgia Co.*, 720 F.2d 1247, 1249 (11th Cir. 1983); *Perez v. Dana Corp., Parish Frame Division*, 718 F.2d 581, 587-88 (3d Cir. 1983).

existed on the issue of the appropriate limitations period for hybrid section 301 actions. 718 F.2d at 585. Instead, the *Perez* court noted that "a legally chaotic situation" existed among the circuits, with the courts applying statutes of limitations ranging from one to six years. 718 F.2d at 586. The court below agreed with the *Perez* court that the pre-*DelCostello* law in their respective circuits was unclear, and concluded that Petitioner could not have reasonably relied on clear past precedent in waiting almost 29 months to file his suit.

The court below also agreed with the *Perez* court that the purpose behind this Court's decision in *DelCostello* would be furthered by retroactive application of that decision. 723 F.2d at 1148. Finally, the court below examined the facts of the instant case, and found that the equities, including the fact that Petitioner waited over two years to bring his action, did not affect its conclusion to apply *DelCostello* retroactively to bar Petitioner's claim. *Id.*

The conflict in result between the court below and the Ninth Circuit's decisions, therefore, is not a conflict over the application or interpretation of the *Chevron Oil* criteria, nor is it a conflict over the interpretation of *DelCostello* itself.[12] Rather, the different results stem from each court's view of the state of the pre-*DelCostello* law in their circuit concerning the limitations period for hybrid section 301 actions. Because no "real and embarrassing conflict" in principle or law exists between the circuits on the issue of *DelCostello*'s retroactivity, therefore, Respondent respectfully requests that this Court deny the instant petition for writ of certiorari. *Layne & Bowler Corporation v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

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12. Indeed, as illustrated by the conclusion of the court below that the purposes behind the *DelCostello* decision favored retroactive application, and by the Ninth Circuit's agreement with that conclusion in *Barina v. Gulf Trading and Transportation Co.*, 726 F.2d 560, 564 (9th Cir. 1984), it is clear that no conflict exists on the interpretation of the *DelCostello* decision itself.

II. The Issue Of Whether This Court Should Re-Examine The Standards For Non-Retroactive Application of Judicial Decisions Announced In Chevron Oil Co. v. Huson In The Context Of The Issue Of DelCostello's Retroactivity.

A. Certiorari Should Be Denied For The Reason That The Court Below Did Not Consider The Issues Raised By Petitioner Concerning The Chevron Oil Standards.

The general rule in this Court is that a party may not obtain review of an issue which was not raised in the lower courts. *See, e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Neely v. Martin K. Eby Construction Co., Inc.*, 386 U.S. 317, 330 (1967). Despite this rule, Petitioner in the instant case seeks this Court's review of two issues concerning the *Chevron Oil Co. v. Huson* test for non-retroactivity of judicial decisions which were neither raised in nor decided by the court below. The Petition for Writ of Certiorari on these two issues, therefore, should be denied.

The two issues raised by Murray in his Petition concerning the *Chevron* test are: first, in determining whether a new decision overrules clear past precedent, whether the appropriate focal point is the state of the law at the time the plaintiff's claims arose, or the state of the law at the time of the new decision; and second, whether one factor in the *Chevron* analysis deserves greater weight than the other two factors in determining if retroactive application of a new decision is appropriate. (Petition at 13, 13A). Neither one of these issues, however, was raised in or considered by the court below. (See Appellant's Brief and Supplemental Brief in C.A. No. 82-1202). In fact, a review of the briefs filed in the court below on the issue of *DelCostello's* retroactivity reveals that *all* parties assumed that the appropriate time frame in which to view the initial *Chevron* factor was at the time Petitioner's claims arose. (*See* Joint Supplemental

Brief of Appellees at 10 ("In fact, a review of the status of fair representation litigation at the time Plaintiff Murray's claims arose. . . ."); Appellant's Supplemental Brief at 7 ("Prior to DelCostello, and at the time this cause of action arose in 1976. . . .")). Further, a review of those same briefs demonstrates that Petitioner argued that *all three Chevron* factors supported prospective-only application of *DelCostello*, while Respondents argued that *all three Chevron* factors favored retroactive as well as prospective application of *DelCostello*. Thus, the court below was not presented with any issue concerning the relative weight to be accorded each Chevron factor.[13]

Petitioner, therefore, improperly seeks review by writ of certiorari of issues not raised in or decided by the court below. Because of this defect, Respondent respectfully requests that this Court deny the instant petition.

B. Certiorari Should Be Denied For The Reason That No Special Or Important Reasons Justify The Supreme Court's Review of This Issue.

As discussed in Part I(A) of this Brief, this Court's certiorari jurisdiction is designed for review of issues beyond the "intellectually interesting" and "academic;" for an issue to justify certiorari review within the meaning of Supreme Court Rule 17.1, it must be relevant to the ultimate outcome of the case. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). As discussed above, Murray seeks to have this Court review by writ of certiorari two issues concerning the *Chevron Oil Co. v. Huson* test for non-retroactive application of judicial decisions. Respondent submits, however, that this Court's resolution of one or both of these issues would not alter the decision below, and that the Petition should therefore be denied.

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13. Indeed, the court below in its opinion expressly found that *all three Chevron* factors favored retroactive as well as prospective application of *DelCostello*. 723 F.2d at 1148.

Petitioner first alleges that the circuit courts are in conflict over the temporal focal point for application of the first *Chevron* factor.[14] Although Petitioner does not complete the argument, he seemingly contends that the decision of the court below to apply *DelCostello* retroactively was somehow affected by the time frame that the court chose in considering the first *Chevron* factor. As noted in Part II(A) of this Brief, however, the court below made no mention of this issue, and in fact the parties were in agreement on the proper time frame. Further, in the decision relied upon by the court below, *Perez v. Dana Corporation, Parish Frame Division*, 718 F.2d 581 (3d Cir. 1983), the Third Circuit Court of Appeals expressly stated that its decision to apply *DelCostello* retroactively was unaffected by the parties' disagreement in that case as to what prior law the court should consider:

> The parties disagree as to what prior law we should consider. The Company and the Union argue that we must look to the state of the law at the time of the ruling that allegedly changed prior law, here *DelCostello* . . . Perez asserts that we must look at the law as it existed at the time that his cause of action arose . . . The issue arises because both *Liotta* and [*United Parcel Service v. Mitchell*, 451 U.S. 56 (1981)] were decided between the accrual of Perez's cause of action and the Supreme Court's ruling in *DelCostello*. We need not decide the issue, because we hold that *DelCostello* applies retroactively whether or not *Liotta* and *Mitchell* are considered part of the prior law. 718 F.2d at 585.

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14. As discussed in Part I(B) of this Brief, that factor is whether the new decision establishes "a new principle of law, either by overruling clear past precedent on which the litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971).

Thus, the Third Circuit's decision in *Perez*, and in turn the decision of the court below to apply *DelCostello* retroactively, were expressly independent of any dispute over the proper time frame in which to view the first *Chevron* factor. In the context of the instant case, therefore, the issue of what time period is appropriate in a *Chevron Oil* analysis is merely academic; resolution of the issue will have no effect on the outcome of this case.

Similarly, Petitioner cannot show that according one *Chevron* factor greater weight than the other two factors would affect the decision of the court below. Indeed, the court below, relying on *Perez*, found that *all three Chevron* factors favored retroactive application of this Court's *DelCostello* decision. Thus, even if this Court were to decide that one factor in the *Chevron* analysis is more important than the other two factors, such a finding would have no effect on the decision of the court below. The issues raised by Petitioner are therefore nothing more than "intellectually interesting and solid problem[s]" that do not rise to the level of "special and important" as that phrase is used in Supreme Court Rule 17.1. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Thus, Respondent respectfully requests this Court to deny the instant petition for failure to raise a special and important issue.

CONCLUSION

No special or important reasons exist for this Court to grant a writ of certiorari for review of the decision below. Any significance to the issue of *DelCostello's* retroactivity is diminished by this Court's retroactive application of the six-month limitations period in *DelCostello* itself, and by this Court's denial of certiorari in four other cases that have raised the issue. Indeed, the issue is only academic in the instant case, as Petitioner's action would be barred by the applicable limitations period even if *DelCostello* did not apply. Further,

the alleged conflict between the decision of the court below to apply *DelCostello* retroactively and the Ninth Circuit Court of Appeals' decision to apply *DelCostello* prospectively only lies not with the legal principles involved but with the factual settings to which those principles were applied.

Finally, because Petitioner did not raise and the court below did not decide the issues presented in the Petition concerning this Court's *Chevron* decision, those issues are not properly before this Court. Even assuming *arguendo* that the issues are properly before this Court, however, no special or important reasons exist for granting certiorari on those issues because resolution of the issues in this Court would not alter the decision below. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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EXHIBIT 1

ROMAN WELYCZKO, Plaintiff-Appellant, against U.S. AIR, INC. and THOMAS POMEROY as Chairman of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, Local No. 75, District 141,

Defendants-Appellees

No. 83-7976; No. 999 — August Term, 1983

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Slip Opinion

Argued March 30, 1984

April 25, 1984

APPEAL-STATEMENT

Appeal from a judgment of the United States District Court for the Northern District of New York, Howard G. Munson, Chief Judge, granting appellees' motions to dismiss appellant's complaint under §2 of the Railway Labor Act, 45 U.S.C. §152, as barred by the statute of limitations.

Affirmed.

Counsel:

MICHAEL T. MCGARRY, Albany, N.Y. (Lombardi, Reinhard, Walsh & Harrison, Albany, N.Y.), for Plaintiff-Appellant.

MELVIN H. OSTERMAN, JR., Albany, N.Y. (Whiteman, Osterman & Hanna, Albany, N.Y.), for Defendant-Appellee U.S. Air, Inc.

PETER P. PARAVATI, Utica, N.Y., (Constance J. Angelini), for Defendant-Appellee Thomas Pomeroy.

Opinion By: KAUFMAN

OPINION

Before: KAUFMAN, KEARSE, and PIERCE, Circuit Judges.

KAUFMAN, *Circuit Judge:*

Roman Welyczko appeals from the dismissal of his hybrid claim against his employer for wrongful discharge, and against his union for breach of its duty of fair representation. The district judge based his action upon the Supreme Court's decision in *DelCostello v. International Brotherhood of Teamsters*, ____U.S.____, 103 S.Ct. 2281 (1983), which established a six-month statute of limitations for claims under §301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §185(a). We hold that the DelCostello decision has both retroactive and propsective application, and therefore affirm the dismissal of Welyczko's complaint.

I

We shall briefly review the facts. The parties have agreed that Welyczko was an employee of U.S. Air, Inc. ("U.S. Air") and that the terms and conditions of his employment were governed by a collective bargaining agreement between U.S. Air and the International Association of Machinists and Aerospace Workers ("IAM"). Welyczko was granted a 90-day medical leave of absence on May 5, 1975. On or about July 31 of that year, he wrote to his employer requesting an extension of leave. He reiterated that request by telegram on August 3. Approximately three days later, Welyczko received a letter from a U.S. Air executive, notifying him that his request for extended leave would be considered only upon receipt of corroboration from a physician that additional leave was necessary. Because his doctor was then on vacation, Welyczko decided to forward to U.S. Air a second copy of the physician's note, dated May 5. This document had accompanied his original application for leave.

U.S. Air refused to accept the copy as adequate substantiation. Accordingly, when Welyczko did not return to work, the company terminated his employment on August 26, 1975. This discharge was made retroactive to August 5, the day his authorized leave expired. Welyczko responded by requesting an officer of the IAM to arrange a special hearing on his discharge, pursuant to the collective bargaining agreement. The IAM contradicts this by replying that Welyczko was advised that he himself would have to make a written request for such a hearing. In any event, the hearing was never held, and the discharge action became final.

The instant suit was commenced in New York State Supreme Court on March 5, 1981, and was subsequently removed to federal court. After DelCostello was decided, appellees moved for summary judgment asserting that the statute of limitations adopted in this case should apply retroactivley to Welyczko's cause of action, which accrued in 1975. On November 1, 1983, in a ruling from the bench, Chief Judge Munson granted the motion. Welyczko appeals.

II

In DelCostello, the Supreme Court decided that a uniform federal statute of limitations should apply to claims under §301 of the LMRA. In the absence of an expressly applicable federal limitations period, the Court acknowledged, the "most closely analogous statute of limitations under state law" would normally govern. 103 S.Ct. at 2287. The Court concluded, however, that the "federal policies at stake and the practicalities of litigation make [federal law] a significantly more appropriate vehicle for interstitial lawmaking" in this instance. Id. at 2294. It therefore held that the six-month time limit on unfair labor practice complaints under §10(b) of the National Labor Relations Act applied to §301 claims as well.

Welyczko's claim must be construed as arising under the Railway Labor Act, 45 U.S.C. §151 et seq.,

which governs air carriers in lieu of the LMRA. See 29 U.S.C. §§142, 152; 45 U.S.C. 181. We agree with the Ninth Circuit, however, that this distinction is "without import." *Barina v. Gulf Trading and Transportation Co.*, 726 F.2d 560, 563 n.6 (9th Cir. 1984). The same policies which led the Supreme Court to apply a federal statute of limitations to claims under §301 of the Labor Management Relations Act apply with equal force to substantively identical claims under the Railway Labor Act.

We have already applied the DelCostello rule retroactively, although the issue was not specifically discussed. *Assad v. Mount Sinai Hospital*, 703 F.2d 36 (2d Cir.), vacated, 104 S.Ct. 54 (1983), on remand, 725 F.2d 837 (1984). Our action there was consistent with the "general rule of long standing" that "judicial precedents normally have retroactive as well as prospective effect." *National Association of Broadcasters v. FCC*, 554 F.2d 1118, 1130 (D.C. Cir. 1976), quoted in *Kremer v. Chemical Construction Corp.*, 623 F.2d 786, 788 (2d Cir. 1980), aff'd, 456 U.S. 461 (1982). All but one of the circuits considering the retroactivity of DelCostello have reached the same result. *Perez v. Dana Corp., Parish Frame Division*, 718 F.2d 581 (3rd Cir. 1983); *Murray v. Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir. 1983); *Edward v. Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir. 1983); *Curtis v. Int'l Brotherhood of Teamsters*, Local 299, 716 F.2d 360 (6th Cir. 1983) (per curiam) (dictum); *Storck v. Int'l Brotherhood of Teamsters, Local Union No. 600*, 712 F.2d 1194 (7th Cir. 1983) (per curiam); *Lincoln v. District 9 of the Int'l Ass'n of Machinists and Aerospace Workers*, 723 F.2d 627 (8th Cir. 1983); *Hand v. Int'l Chemical Workers Union*, 712 F.2d 1350 (11th Cir. 1983) (per curiam); contra, *Edwards v. Teamsters Local No. 36*, 719 F.2d 1036 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 1599 (1984).

III

Appellant urges us to carve out an exception to the retroactivity principle so that his claim may proceed, arguing that under the three-factor test articulated by the Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the DelCostello holding should be given only prospective application. Most of the authorities just cited, however, applied the Chevron test and found that DelCostello should be applied retroactively. See *Perez v. Dana Corp., Parish Frame Division, supra*, 718 F.2d at 584-85; *Murray v. Branch Motor Express Co., supra* (adopting reasoning of Perez); *Edwards v. Sea-Land Service, Inc., supra*, 720 F.2d at 860-62; *Lincoln v. District 9 of the Int'l Ass'n of Machinists and Aerospace Workers, supra*, 723 F.2d at 629-30. Moreover, in our view this case does not present circumstances in which the use of the Chevron test would be appropriate.

Were we asked to decide if retrospective effect should be given to a new rule which our court had pronounced, the policy factors enumerated in Chevron Oil would indeed be determinative. See *United States v. Fitzgerald*, 545 F.2d 578, 582 (7th Cir. 1976). Similarly, had the Supreme Court given no indication whether DelCostello should apply retroactively, a Chevron Oil analysis would also be in order. But these factors are not present here. The Supreme Court not only adopted a new statute of limitations in DelCostello; it applied that time bar retroactively to govern the very claim at issue in the case before it. We have noted that "the Supreme Court is well aware of how to avoid the effects of applying one of its rulings retroactively to the case at bar." *Cates v. Trans World Airlines, Inc.*, 561 F.2d 1064, 1073 (2d Cir. 1977). Thus, when that Court itself has given retrospective application to a newly-adopted principle, "no sound reason exists for not doing so here." *Holzsager v. Valley Hospital*, 646 F.2d 792, 797 (2d Cir. 1981). A court of appeals must defer to the Supreme

Court's directive on this issue, explicit or implicit. See *United States v. Fitzgerald, supra,* at 582. Certainly, its intended application is clear in this case.

We therefore decline appellant's invitation to exclude his suit from the DelCostello holding. Rather, we adopt for this circuit the rule that in employment termination cases, a six-month statute of limitations applies both retroactively and prospectively to wrongful discharge/failure to represent claims. Because Welyczko's complaint was filed more than five years after his termination, it is clearly time-barred. Accordingly, we affirm the judgment of the district court dismissing Welyczko's complaint.